Krishnavani a/p Muniandy v Sethambal d/o Doraiappah & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1-22-502 OF 1991 AND S6-32-392 OF 1989
JAMES FOONG J
22 SEPTEMBER 1998

Succession *— Probate — Testamentary capacity — Allegation that testator had no testamentary capacity — Suspicious circumstances surrounding execution of will — Onus of proof*

The deceased died of bone cancer leaving behind a wife ('the plaintiff') and a child. Three days before his death, he purportedly made a will ('the purported will'), with the defendants named as executors. After the deceased's death, the defendants petitioned for probate ('the probate petition') at the Kuala Lumpur High Court. Subsequently, the plaintiff filed two caveats opposing the petition. The plaintiff then filed this civil suit against the defendants, where she claimed for a declaration that the purported will was void ab initio. The probate petition was consolidated with the civil suit to be heard together.

At the hearing, counsel for the plaintiff resisted the admission of the photocopy of the purported will, in which the original was misplaced or lost in the custody of the court. It was the plaintiff's contention that the purported will is a forgery and the signature of the deceased was obtained by fraud committed by the defendants and the deceased's two brothers who attested the deceased's signature on the said document. It was also contended that, in alternative, the deceased has no testamentary capacity when executing the purported will and that the signature was obtained by undue influence. The defendants, in turn, denied the plaintiff's contentions and insisted that the deceased had testamentary capacity when executing the purported will, which was duly attested by the two brothers and that there was no fraud, forgery or undue influence ever exercised or practised. The defendants also claimed that the onus of proving the allegations asserted by the plaintiff is upon the latter.

Held, dismissing the defendants' petition and allowing the plaintiff's claim:

(1) In view of the circumstances of the case, particularly to the fact that these two cases were long outstanding, and that the court was convinced that the original purported will could not be located, a photocopy of the purported will was allowed to be admitted (see p 371C–D).

(2) It is well settled that the onus of proving a will is always on the propounder when the issue of testamentary capacity of the grantor is raised and when there appears to be suspicious circumstances

surrounding the execution of the will. For this, the suspicious circumstances must first be found to be in existence and thereafter, the onus is on the defendants to remove these suspicions. On the allegation of fraud and undue influence, the burden of proof was on the plaintiff. Until the suspicions were removed, the plaintiff need not begin her task of proving fraud and undue influence (see p 372H, F); *Tyrrel v Painton* (1893) PD 151 followed.

(3) On the facts, based on the severity of the deceased's physical condition, the suspicion on the testamentary capacity of the deceased at the material time was exceedingly high. In the absence of more substantive evidence from the defendants to prove otherwise, the testamentary capacity of the deceased at the time of execution of the purported will could not be considered as established (see p 375A–B).

[Bahasa Malaysia summary

Si mati telah mati akibat penyakit barah tulang dan meninggalkan seorang isteri ('plaintif') dan seorang anak. Tiga hari sebelum kematiannya, ia dikatakan telah membuat wasiat ('wasiat tersebut'), dengan menamakan defendan-defendan sebagai wasi. Selepas kematian si mati, defendan-defendan mengemukakan petisyen untuk probet ('petisyen probet tersebut') di Mahkamah Tinggi Kuala Lumpur. Berikutnya, plaintif memfailkan dua kaveat menentang petisyen tersebut. Plaintif kemudiannya memfailkan guaman sivil ini terhadap defendan-defendan, di mana ia menuntut suatu perisytiharan bahawa wasiat tersebut adalah tak sah ab initio. Petisyen probet tersebut telah digabungkan dengan guaman sivil untuk dibicarakan bersama.

Di pembicaraan, peguam plaintif menentang penerimaan fotokopi wasiat tersebut, dalam mana yang asal disalahletakkan atau hilang dalam jagaan mahkamah. Adalah merupakan penghujahan plaintif bahawa wasiat tersebut adalah pemalsuan dan tandatangan si mati telah diperolehi melalui fraud yang dilakukan oleh defendan-defendan dan adik-beradik si mati yang telah mengakusaksi tandatangan si mati atas dokumen tersebut. Adalah juga dihujahkan bahawa, secara alternatif, si mati tidak mempunyai keupayaan perwasiatan ketika melaksanakan wasiat tersebut dan bahawa tandatangan tersebut telah diperolehi akibat pengaruh tak wajar. Sebaliknya, defendan-defendan menafikan hujah plaintif dan menegaskan bahawa si mati mempunyai keupayaan perwasiatan semasa melaksanakan wasiat tersebut, yang diakusaksi oleh dua adik-beradik tersebut dan bahawa tidak wujudnya apa-apa fraud, pemalsuan atau pengaruh tak wajar yang pernah dilaksanakan atau diamalkan. Defendan-defendan juga menuntut bahawa beban untuk membuktikan pengataan-pengataan yang dihujahkan oleh plaintif terletak pada plaintif sendiri.

Diputuskan, menolak petisyen defendan-defendan dan membenarkan tuntutan plaintif:

(1) Memandangkan keadaan-keadaan kes, terutamanya hakikat bahawa kedua-dua kes ini telah lama menonjol, dan bahawa mahkamah yakin bahawa wasiat tersebut yang asal tidak boleh dikesan, fotokopi wasiat tersebut boleh diterima (lihat ms 371C–D).

(2) Adalah mantap bahawa beban membukti wasiat sentiasa terletak pada pihak yang mengaju apabila isu keupayaan perwasiatan pihak yang memberi wasiat dibangkitkan dan apabila kelihatan keadaan yang syak yang mengelilingi pelaksanaan wasiat. Untuk tujuan ini, keadaan yang syak mestilah pertamanya dibuktikan wujud dan selepas itu, beban terletak pada defendan-defendan untuk menyingkirkan kesangsian ini. Atas pengataan fraud dan pengaruh tak wajar, beban membukti terletak pada plaintif. Sehingga kesangsian disingkirkan, plaintif tidak perlu memulakan tugas membuktikan fraud dan pengaruh tak wajar (lihat ms 372H, F); *Tyrrel v Painton* (1893) PD 151 diikut.

(3) Atas fakta-fakta, berdasarkan keseriusan keadaan fizikal si mati, kesangsian atas keupayaan perwasiatan si mati pada masa material adalah amat tinggi. Dalam ketiadaan keterangan yang lebih substantif daripada defendan-defendan untuk membuktikan sebaliknya, keupayaan perwasiatan si mati pada masa pelaksanaan wasiat tersebut tidak boleh dianggap terbukti (lihat ms 375A–B).]

Notes

For cases on testamentary capacity, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1998–2006.

Cases referred to

Perera & Ors v Perera & Anor [1901] AC 354 (refd)
Tyrrel v Painton (1893) PD 151 (folld)
Udham Singh v Indar Kaur [1971] 2 MLJ 263 (refd)

PL Teh (*Teh & Associates*) for the plaintiff.
Hamid Sultan (*Hamid Sultan & Rakan-Rakan*) for the defendants.

James Foong J: On 3 August 1989, Krishnan a/l Veerasamy ('the deceased') died of bone cancer at the age of 36 leaving behind a wife ('the plaintiff'), whom he married in 1988, and a young child of about four months old at the time of his death.

He purportedly made a will ('the purported will') on 1 August 1989, three days before his death. In this purported will, the first and second defendants, his brother and mother respectively, are named executors. There are two specific legacies:

A (a) a dwelling house known as No 9, Jalan 12/38A Taman Sri Sinar, Segambut, Kuala Lumpur ('the house') bequeathed to the second defendant; and

(b) all monies in the Employees Provident Fund ('EPF') and insurance policies to his surviving child.

B The plaintiff is the sole beneficiary under the general legacy.

I am given to understand that the original purchase price of the house was about RM99,000. Though only a deposit was paid for the purchase by the deceased, it became fully settled upon his death by an insurance scheme in which he participated. This house now draws a rental income of about C RM450 and is paid over to the plaintiff. As for the money in the EPF and from the insurance policies, it is worth about RM6,000. Beside these assets, nothing remains for the distribution under the general legacy.

On 17 September 1989, the first and second defendants petitioned for probate bearing Probate No S6–32–392–89 High Court, Kuala Lumpur D ('the probate petition'). Accompanying this petition was an original purported will. This was examined by a court official, and kept in the custody of the court. A caveat to this petition was lodged by the plaintiff on 30 June 1990, followed by a second filed by the plaintiff on 13 April 1992. In the meantime, on 9 September 1991, the plaintiff filed this civil suit against the defendants. Here she claims:

E (i) a declaration that the purported will is void ab initio;

(ii) costs; and

(iii) any other relief as the court considers it appropriate to grant.

The second caveat of the plaintiff in the probate petition had lapsed, but no F hearing was however fixed for this petition. I believe that this was due to the court having misplaced or lost the purported original will. The inability to locate this document is confirmed by the evidence of the senior assistant registrar ('DW5') of the Kuala Lumpur High Court attached to the particular civil division which handled this petition.

G On 12 June 1998, this probate petition was consolidated with this civil suit. Though it is more appropriate that the probate petition be the single action in this case, by the nature and circumstances of the delay, the lapse of the caveat and the filing of this civil suit, I shall consider these two actions as a contested matter.

H *The plaintiff's claim*

In the plaintiff's statement of claim, the following are alleged:

(1) The purported will is void and of no effect for reason that it is not the will of the deceased.

I (2) It is a forgery, and the signature of the deceased was obtained by fraud committed by the defendants and the deceased's two other brothers who attested the deceased's signature on this document.

(3) In the alternative:

(a) the deceased when executing the purported will was not of sound mind, memory and understanding; and

(b) that the signature was obtained by undue influence.

To support the contentions, the plaintiff testified as follows: she was happily married to the deceased and before deceased's death, they lived with the deceased's family. Her relationship with her mother-in-law, the second defendant, was cordial. The deceased was admitted to the hospital on 27 July 1989, and until his death, she visited him and took care of him; sharing this responsibility with the second defendant. On 31 July 1989, according to her, the deceased was very ill. He complained of excrutiating pain in his back, hands and legs; he could hardly speak. By 1 August 1989, the plaintiff observed that he was breathing through an oxygen mask and was on drips; he spoke very little and was gasping for breath. On this particular day, she was at the hospital between 1.15 pm to 1.30 pm and did not observe the presence of the defendants nor the two who attested to the purported will. Finally, on 3 August 1989, the deceased expired. After the funeral, she discovered that money was withdrawn from the deceased's 'ATM' account. She also overheard that the deceased's family was planning to marry her off to one of the deceased's brothers, whose wife had died by suicide earlier. By the 16th day of prayer offered to the deceased, relationship between her and the deceased's family became very strained. She and her child had moved out of the matrimonial home and returned to stay with her parents. Eventually, the probate petition and this suit were filed.

The defendants' defence

The defendants denied the plaintiff's claim. They insisted that the deceased had testamentary capacity, of sound mind, memory and understanding when executing the purported will which was duly attested by the two brothers. They further explained that the purported will was prepared by a lawyer ('DW4') who personally took instructions from the deceased in the hospital. There was no fraud, forgery or undue influence ever exercised or practised.

The issue of the purported original will which is lost

Before I proceed to analyse the substantive claims of the parties, it is essential that the issue of the purported original will which is claimed to be lost while in the custody of the court be disposed of.

Ms Teh, counsel for the plaintiff, has strenuously resisted to the admission of a photocopy of the purported original will as evidence. I believe that her approach may be tactical, since failure to produce the original may reduce the defendants' chances in securing the probate. But this is not in tandem with the plaintiff's claim in this suit. If there is no purported will in existence at all, then there is no necessity for the plaintiff to seek the declaration sought; her claim is obviously based on the existence of an original purported will.

A According to 17 *Halsbury's Laws of England* (4th Ed) at para 822:

> Where a testamentary instrument has been lost or destroyed in such a way as not to effect a revocation, probate may be granted of its contents upon proof of those contents and of the due execution and attestation of the instrument.

And in para 841:

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> An application for an order admitting to prove a nuncupative will or a will contained in a copy, a completed draft, a reconstruction or other evidence of its contents where the original will is not available is to be made to the registrar.

There is no application of this nature made to the court. The defendants C cannot be put at fault or blamed for this. They made numerous enquiries to the court about their petition but received no reply. Probably, if they were informed of the true state of affairs by the court, an application to admit a copy of the purported will would have been made prior to this hearing. Nevertheless, in view of the circumstances of this case, particularly to the fact that these two cases are long outstanding, and that I was convinced that D the original purported will cannot be located, I have admitted a photocopy of this purported will found in pp 60 and 61 of encl 39. This is an exact reproduction of a photocopy of the purported will attached to the probate petition to be used for proving the existence of a will. My action was much influenced by two factors.

E Firstly, the photocopy of this purported will is the same as that attached to the probate petition. According to DW5, the practice of the court is that upon filing of a probate petition, a court official will check and compare the photocopy of the will attached to the petition with that of the original which accompanied the filing. When this is completed, a stamp bearing the words 'Examined by ..... clerk, High Court Kuala Lumpur' is affixed on F the photocopy of the will attached to the petition. I find this stamp affixed to this document in the probate petition file and it has the signature of the clerk. By this, I am satisfied that this photocopy of the purported will had been examined, compared with the original and certified to be similar.

Secondly, I observed that the plaintiff has disclosed in her statement of G claim the contents of the purported will. It is exactly what is stated in the photocopy attached to the probate petition. By such revelation, obviously the plaintiff must have accepted the existence of such a purported original will and intends to challenge it.

Burden of proof

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Due to the fact that these two actions are consolidated, there appears to be some confusion as to the onus of proof. I find this strange, for it is well settled that the onus of proving a will is always on the propounder when the issue of testamentary capacity of the grantor is raised and when there appears to be suspicious circumstances surrounding the execution of the I will. The first is clearly set out in the case of *Udham Singh v Indar Kaur* [1971] 2 MLJ 263 at pp 264–265, where Ismail Khan CJ (Borneo) delivering that judgment of Federal Court expressed as follows:

> A person has testamentary capacity when he understands the nature of his act and its effect; the extent of the property of which he is disposing; the claims to which he ought to give effect; and, with a view to the latter object, no disorder of the mind must poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; and no insane delusion must influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made (*Banks v Goodfellow* (1870) LR 5 QB 565).

And:

> Once this point was taken, it is clear law that the burden of proving testamentary capacity rests on the defendant (see *Smee v Smee* 5 PD 84 at p 91).

The defendant in the case of *Udham Singh v Indar Kaur* was the person propounding the will.

The second, where there is circumstance which excites suspicion, *Tyrrel v Painton* (1893) PD 151 laid down the principle that the party propounding the will must:

> remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the will — Lindley LJ at p 157.

Analysis

In my opinion, the plaintiff's claim should be separated into two parts. This first is based on suspicious circumstances surrounding the making and attestation of the purported will and, if so made and duly attested, the deceased had no testamentary capacity at the material time. For this, the suspicious circumstances must first found to be in existence and thereafter, the onus is on the defendants to remove these suspicions. The second is the allegation of fraud and undue influence and towards this, the burden of proof is on the plaintiff. From the authority of *Tyrell v Painton*, until the suspicions are removed, the plaintiff need not begin her task of proving fraud and undue influence.

I shall thus begin by analysing the various suspicious circumstances claimed by the plaintiff.

The presence of three brothers at the same time

It is the suspicion of the plaintiff that the presence of DW1, DW2 and DW3 at the time of the alleged execution of the will was too much of a coincidence, particularly when she saw none of them in the hospital on the day the purported will was executed. This gives rise to a misgiving that the purported will may not have been executed by the deceased and, if executed, not before these two attestators: DW2 and DW3.

From the evidence adduced, all these three witnesses, DW1, DW2 and DW3, made no prior arrangement to meet during lunch hour on 1 August

1989 at the bedside of the deceased. They all affirmed that they did not see the plaintiff there. According to DW2 and DW3, they happened to visit the deceased at that material time when DW1 brought along the will, entirely on his own volition. Though I agree that it is not unnatural in our Asian customs to visit a close relative gravely ill in hospital at any time, but, surely one can recall the approximate hour of the day, given the significance of the event where a will was signed and the testator, a brother, died two days later. Surprisingly none of these witnesses can have such recollection except to state that it was around lunch time. This is strange considering that these witnesses were in employment where observation of working hours and strict hospital visitation period coupled with the unusual incident would have, at least, stimulated one of them to recall the approximate hour of their visit. Flowing from this, if there had been no prior arrangement to meet then, who were intended to be the attestators of the purported will? There is evidence that DW1 just happened to walk in when DW2 and DW3 were there. If this was the case, who did DW1 or the testator intend to attest the will if DW2 and DW3 were not there? These incongruous circumstances do indeed cast doubts on whether the attestators were actually there when the purported will was alleged to be signed by the deceased.

Observations of the witnesses

The next aspect relates to the observations of these witnesses on the condition of the deceased at the material time. Here, two features are prominent. The first is whether the deceased was with oxygen mask and on drip. The second is the overall physical condition of the deceased.

It is unfortunate that the doctor who attended to the deceased just before his death was not called as a witness. The defence seemed to harbour the view that the onus on proving the allegations asserted by the plaintiff is upon the shoulders of the plaintiff. I am afraid that this perception is erroneous as elaborated in the earlier part of my judgment pertaining to the burden of proof, particularly when the plaintiff has pleaded the non-existence of a will and is claiming no testamentary capacity. However, the medical reports of the deceased when he was in hospital were admitted in the evidence. They fall within the category of documents to be admitted without the need of the maker being called except that the truth of its contents are in dispute. Nevertheless, they are of some assistance. The particular report which I find most relevant and useful is on p 38 of encl 39. It is by the doctor who was then the registrar of the department in the hospital where the deceased received his treatment. The relevant parts are:

> On 1 August 1989, the patient complained of difficulty in breathing. A chest X-Ray done on the same day revealed patchy opacities in the left upper zone and the right upper, middle and lower zone of the lungs. These were suggestive of lung secondaries but the patient was started on antibiotic treatment with intravenous ampicillin 500 mg 6 hourly and gentamacin 80 mg 12 hourly. He was also afebrile ...
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> On 3 August 1989 at 10.40 am, the patient stopped breathing and was certified dead.

The plaintiff is not disputing the accuracy of this report, in fact she relied on it. The defendants, on the other hand, seem to be challenging it, but forwarded no evidence to contradict it. On this basis, I see no reason why I should not accept this medical statement as accurate on the deceased's medical condition at the material time when there is no evidence to influence me otherwise.

Taking the deceased's general physical condition first, I do not think he was well on the 1 August 1989. The said medical report recorded him complaining of difficulty of breathing and secondaries were detected in his lungs. These 'secondaries' in the lungs must be associated with cancer in the bone which DW1 confirmed that the deceased was suffering from; it had spread to the lungs. This immediately contradicts DW1's claim that the deceased was 'suffering from only bone cancer and not lung cancer' when he attempted to dismiss the plaintiff's assertion that the deceased was wearing an oxygen mask. Under such condition, I find it difficult to accept DW2 and DW3's opinion that the deceased was 'well', sat up in bed, had a conversation with them, read the purported will, requested them to attest, and then the document was handed back to DW1. These descriptions by DW2 and DW3 also contradict drastically with the account given by PW2, the brother of the plaintiff, who visited the deceased the day before the purported will was signed and in which he expressed:

> His [the deceased] condition was bad; he cannot get out of bed by himself; he can't move his hands and legs and he cannot carry his load. He was very pale. I spoke to him. He said he can't eat and drink well.

I do not think this portrayal is an exaggeration in view of the medical report, and that the deceased's medical condition could have changed for the better overnight, considering that he passed away so soon thereafter.

With the deceased experiencing breathing difficulty, there is probable truth in the assertion by the plaintiff of the presence of oxygen mask on the deceased.

On the question of whether the drip was applied to the deceased, there are strong convincing evidence, beside the assertion of the plaintiff herself, that it was administered. PW2 has told this court that the deceased disclosed to him that he was not eating and drinking well. Then there was the breathing difficulty stated in the medical report which was even confirmed by DW1. In such a condition, the assertion of the plaintiff on the presence of the drip is also sustainable.

The suspicions expressed by the plaintiff, in my opinion, are probably true, and I am not satisfied that the defendants have removed them. Mere denials in the testimonies of the defendants' witnesses are insufficient in the circumstances of this case; there is a necessity for the defendants to do more to convince this court, but this, they have failed to achieve. With this, I have serious apprehension of validity of the purported will, both to the fact that it was executed by the deceased and attested by the two attestators at the material time when it was signed. DW2 and DW3 may have subsequently attested to it, but this was not in compliance with the law to make the purported will valid.

Testamentary capacity

With the severity of the deceased's physical condition as described above, the suspicion on the testamentary capacity of the deceased at the material time is exceedingly high. Again in the absence of more substantive evidence from the defendants to prove otherwise, the testamentary capacity of the deceased at the time of the execution of the purported will cannot be considered as established.

The principle of *Perera v Perera*

I have been referred to the case of *Perera & Ors v Perera & Anor* [1901] AC 354 which supports the proposition that if a testator has given instruction to a solicitor at a time when he was able to appreciate what he was doing in all its relevant bearings, and if the solicitor prepares the will in accordance with these instructions, the will stands good although at the time of execution, the testator is capable only of understanding that he is executing the will which he has instructed, but no longer capable of understanding the instructions themselves or the clauses in the will which give effect to them. Though I am in agreement with this principle, the circumstances in the present case are different. Firstly, though the deceased may have given prior instructions to DW4 to prepare the purported will, was it actually executed and attested in the manner set out in the law? There are suspicions cast upon these factors and these suspicions are not removed. It is quite different in a situation where there is no dispute on the execution and attestation of the will except at the time of signing, the testator was not capable of understanding the contents of the will. Here, the defence never contested that the deceased had a lapse in memory at the time of signing the purported will. They have all along maintained that the deceased was of sound mind.

Finding

Having failed to remove the suspicions and to prove testamentary capacity, there is no necessity to consider whether fraud or undue influence is satisfied by the plaintiff. As the propounders of the will have failed to prove the will itself, I accordingly:

(1) dismiss the defendants' petition for probate in S6–32–392–89; and

(2) allow the plaintiff's claim in S5–22–502–91 with costs.

Defendants' petition dismissed. Plaintiff's claim allowed with cost.

Reported by Mohd Rizal Abidin